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NEW LAW PERMITS SNOWBIRDS TO STAY IN OHIO LONGER WITHOUT BECOMING A RESIDENT FOR INCOME TAX PURPOSES

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On December 19, 2014, Governor Kasich signed HB 494 into law, changing Ohio's presumption of domicile for state income tax purposes. For those of us who counsel snowbirds with homes in Florida and elsewhere, it gives them more opportunity to visit grandchildren and live in Ohio an additional thirty days without the concurrent income tax burdens of being considered a full time resident for Ohio income tax purposes. The effective date for the new provision, at R.C. 5747.24, is March 23, 2015.

It is not a huge change—it basically allows people to stay an extra month in Ohio without being considered a resident for tax purposes. To be more precise, Ohio's law measures "contact periods." An individual "has one contact period in this state" if the individual is away overnight from the individual's abode located outside this state and while away overnight from that abode spends at least some portion, however minimal, of each of two consecutive days in this state.¹

It's worth revisiting the entire paragraph of this provision to remind practitioners of the value of filing a statement with the tax commissioner, which is required for a taxpayer to avail oneself of the irrebuttable presumption—note the "if" bolded below:

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The Ohio Supreme Court dealt with another domicile case in *In re Hutson's Estate*, 165 Ohio St. 115, 59 Ohio Op. 130, 133 N.E.2d 347 (1956), where the issue was which municipality would be owed inheritance tax on decedent's estate. The decedent lived in Bethel, Ohio, since 1891, when he was 16 years old, until 1948. In 1948 sickness led him to stay with a sister in Batavia, Ohio, and then with relative in Amelia, Ohio. The decedent maintained a mailing address in Bethel for all his business affairs, and made statements in trips to Bethel to individuals that he intended to return there. But he moved all his personal belongings to Amelia, where he identified Amelia as his residence when he voted in an election there in 1950. The trial court held that the decedent "never truly" intended to leave Bethel and retained it as his domicile. The Supreme Court emphasized the necessity of intent in establishing domicile, which intent cannot be based on mere wistful yearning, citing *Redrow v. Redrow*, 94 Ohio App. 38, 51 Ohio Op. 266, 114 N.E.2d 293 (1st Dist. Clermont County 1952), "The intention to retain a former domicile is unavailing if it is doubtful, vague, or equivocal."

In the *Schill* case, the appellate court reversed the judgment of the trial court, concluding that reasonable minds could only conclude that James was domiciled in Ohio. The Supreme Court held that the opposite is true. James's clear intent was to work part-time in Ohio and be domiciled in Florida. "He has meticulously ordered his life to make that so."

Therefore, since Robert did not have the same "legal residence of domicile" as either of his parents, he was not an insured "resident relative" under the umbrella policy at issue.

BREAKING DOWN A TRUST DISPUTE

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INTRODUCTION

With lawsuits seeking to invalidate estate planning documents becoming more common it is helpful to understand the intricacies of the court decisions involved. Sometimes key details surrounding the litigation are lost in the more commonly accessible appellate opinions. Our recent successful representation of a Trustee defending a challenged Trust amendment in *Kinchen v. Mays, Trustee, et al.*, 8th Dist. No. 100672, 2014-Ohio-3325, illustrates both the implicit and explicit aspects of a post-death challenge to estate planning. This article attempts to break down the case with a discussion of factual and procedural issues at both the probate court and appellate court levels.

BACKGROUND FACTS

In *Kinchen* a second wife/surviving spouse challenged a Trust amendment executed two weeks before her husband/settlor (a former attorney) died as a result of a sudden onset illness. The amendment, prepared by a contemporary of the settlor's long time former law partner in Ohio, increased the funding of the family trust, for the exclusive benefit of the settlor's five children from his prior/first marriage, from \$2,000,000 to \$4,000,000 before funding the Q-Tip marital Trust for the benefit of the second wife/surviving spouse. When the settlor died (residing in Georgia having ultimately relocated from Ohio) his Trust assets were valued at less than \$4,000,000 causing the surviving spouse to inherit nothing from the Trust. Despite the peculiar timing between trust amendment and the date of the settlor's death there was no indication to the scrivener when she conferenced by telephone with the settlor that the settlor was suffering from any mental deficits.

Discovery further revealed that the settlor

consistently went to great lengths to take care of his children, said to numerous independent witnesses he was going to divorce his surviving spouse/second wife, had said he was going to permanently move out of the marital home, and that he had exhibited zero evidence of cognitive dysfunction to disinterested witnesses including two ongoing business partners of more than twenty five years.

The settlor first discussed with the scrivener and executed the amendment during the surviving spouse's planned two week vacation to visit her elderly parents. The surviving spouse took part in arranging for one of the settlor's daughters to be in town with the settlor to provide support and supervision due to the settlor's physical limitations. The complaint explicitly targeted the visiting daughter as the sole person exerting the undue influence.

PROCEDURAL HISTORY

After a Georgia court ruled that the surviving spouse had to file any trust contest in Ohio, the surviving spouse through counsel filed her lawsuit in Cuyahoga County Probate Court. The lawsuit, filed by an attorney with limited probate court litigation experience, was riddled with claims and allegations involving the administration of the Georgia probate estate which was clearly outside the jurisdiction of Ohio courts and was met with successful dispositive motion practice. Moreover, the plaintiff's complaint admitted that without invalidating the Trust amendment, the Q-Tip was unfunded. Accordingly, the complaint contained an implicit admission that the surviving spouse lacked standing to dispute the Trustee's administrative conduct (since under the status quo trust as amended she lacked a pecuniary interest) resulting in the court granting the Trustee's motion to bifurcate the breach of fiduciary duty claims with the claim to invalidate the trust amendment. The case went forward on the challenge to the Trust amendment.

A case management order was issued by the Court requiring discovery to be completed sooner than the parties thought possible. The parties appeared at the first pre-trial and jointly requested an additional 120 days to complete discovery beyond the current deadline. The case management order was amended to include later fact and expert discovery deadlines, dispositive motions deadlines, and a trial date. Accordingly, plaintiff's original counsel had agreed that this case schedule provided enough time to work up the case.

Written discovery was exchanged and original counsel participated in some fact witness depositions. The surviving spouse's original counsel was then granted the right to withdraw as counsel with approximately eight weeks remaining in the fact discovery period. New counsel appeared with seven weeks remaining in fact discovery to defend the deposition of the surviving spouse and take the deposition of two of the defendant settlor's children including the child accused of undue influence. New counsel participated substantively in several more depositions and other case matters for the remainder of the discovery period but did not file a notice of appearance until after fact discovery closed.

After the close of fact discovery, thirteen months after filing the lawsuit, with a summary judgment deadline a month away and trial scheduled in three months, the surviving spouse asserted the Trust amendment was the result of the settlor's mistake and asked the probate court to allow her to amend the complaint to add a new claim for reformation.

The Probate Judge denied the motion for leave to add a reformation claim primarily based on the undue delay (waiting until after discovery had closed under the amended case management order) and prejudice caused to the defense insofar as raising this issue for the first time after the case was pending with im-

minent dispositive motion deadline and trial date would have kept the defense from conducting discovery on a newly raised matter. Thereafter the Probate Judge granted summary judgment to the Trustee and the co-defendant settlor's children finding no genuine issue of material fact on the validity of the Trust amendment. Once the amendment was found valid by way of summary judgment the probate court dismissed the breach of fiduciary duty claims for lack of standing and disposed of the entire case.

CASE ANALYSIS

The surviving spouse lost a big fight when her motion for leave to amend was denied. The lawsuit as styled was accusatory of both the settlor's daughter but also the settlor. The new theory that the settlor's misunderstanding of his net worth (largely based on real estate holdings in an uncertain market in 2010) was seemingly a more palatable theory not tied to any alleged bad acts or motivation. However, filing her motion for leave almost eight weeks after new counsel got involved and after the close of discovery did not appear to be well received by the probate court.

So long as there is some proper basis upon which the probate court ruled to deny leave to amend the complaint the reviewing court of appeal could not find an abuse of discretion and disturb the ruling. It was strongly argued that the surviving spouse's failure to raise the issue of mistake until after the close of discovery appeared to be an attempt to ambush the defendants with a new theory to invalidate the Amendment. Interestingly, the Court of Appeals never got to the issue of undue delay and prejudice to the defendants because it determined it was not an abuse of discretion to overrule a motion to amend not supported by a "factual basis for the newly asserted claim." *Kinchen*, 2014-Ohio-3325, ¶ 20. The Court of Appeals concluded that the factual basis of a claim of mistake, i.e. the settlor was mistaken

about his net worth when he signed the Amendment, would not have contradicted the scrivener's testimony that the premise upon which the settlor wanted to make a change to his Trust was to pass as much estate tax free to his children and take advantage of the anticipated federal estate tax exemption (estate tax was scheduled to sunset in 2010 with an anticipated congressional fix before the year-end). *Kinchen*, ¶ 18.¹ In summary, the alleged mistake about net worth did not demonstrate the settlor was mistaken about the basis upon which he made the change to his trust and therefore, the trial court did not abuse its discretion in denying leave to amend.

Left with a complaint narrowly and explicitly accusing one person of undue influence, the surviving spouse attempted to create an issue of fact through her own self-serving conclusory affidavit and an affidavit of the settlor's physician who saw the settlor more than a week after the Amendment was executed and when the settlor's medical condition had quickly and significantly deteriorated. In an attempt to create some plausible basis to show that the settlor was unduly influenced by one daughter, the surviving spouse speculated the settlor would never have wanted to disinherit her through the trust amendment. However, with a rational basis supporting the amendment (i.e. taking advantage of federal estate tax laws to benefit his children and marital discord) the surviving spouse could not show exertion of any influence that was of an undue nature. This was a particularly big evidentiary hurdle for the surviving spouse since she was not present at or near the time of the discussions with the scrivener or the execution of the Amendment and admitted she had no personal knowledge of what went into the drafting and execution of the amendment. Furthermore, the scrivener testified that the settlor was having marital discord and that he wanted to increase the amount of money he thought could go estate tax free to his kids. The Court of Ap-

peals' required de novo review of the summary judgment ruling (an independent review of the record without deference to the trial court ruling) showed that "undisputed evidence demonstrated" the settlor "consciously sought to amend the Trust to increase the funding to the family trust pursuant to his discussion" with the scrivener. *Kinchen*, ¶ 15.

Interestingly, the probate court read the complaint to omit a lack of capacity claim and the court disregarded the surviving spouse's attempt to argue that theory to invalidate the amendment. Out of an "abundance of caution" the Court of Appeals "treat[ed] the lack of capacity as properly pleaded for the purposes of the appeal." *Kinchen*, ¶ 8, fn. 1. The Court of Appeals independently reviewing the record found it was not enough to show an issue of fact through the surviving spouse's "self-serving affidavit detailing [her] personal observations of the decedent" in a generalized matter. *Kinchen*, ¶ 13. Since the surviving spouse was not present she was found not competent to testify about the settlor's mental faculties at the time of execution. *Kinchen*, ¶ 14. The Court of Appeals further rejected the affidavit testimony of the settlor's primary care physician that the "intermittent" signs of "confusion and senility," considered "alone is insufficient to demonstrate [the Settlor] lacked capacity at the time he executed the amendment." *Kinchen*, ¶ 14. Accordingly, the Court of Appeals concluded there was no basis in the record for the surviving spouse to show the settlor lacked capacity to make the amendment.

CONCLUSION

This case is illustrative of so much that goes into both the trial court and appellate proceedings involving a challenge to an estate plan. It is not just perceived strength of facts but how those facts are presented to the courts that will affect the outcome of your case. Hopefully

this analysis has shed some light for you into both your planning and litigation protocol.

ENDNOTES:

¹For an interesting discussion of trying to predict within the Estate planning what would happen in the face of the Federal estate tax sunset, see *Steingass v. Steingass*, 8th Dist. 97515, 2012-Ohio-1647.

PROPOSAL: AUTHORIZING ACCESS TO DIGITAL ASSETS BY FIDUCIARIES

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The Ohio State Bar Association Estate Planning Trust and Probate Law Section (EPTPL) is studying legislation permitting access to digital assets by fiduciaries. Why?

Consider this. In December 2013, a 19-year-old college student at the University of Minnesota died of hypothermia. His mysterious death was ruled accidental. He left a party near school and was found along the Mississippi River frozen to death according to KSTP-TV in Minnesota. No criminal investigation ensued, yet the student's family had many questions.

His parents attempted to gain access to their son's final text messages, photographs and phone calls to learn what happened to their son. Regretfully, the family learned that they had no access to the digital contents of their son's phone, even though the phone was in his parents' name. Moreover, the phone was password protected.

This young man's family can physically hold the phone but not access the information it contains. To this day, his parents have yet to access this information and their questions